SUPREME COURT

228

No. ~~1150~~

JUN 8 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT L. NICHOLSON,

Petitioner,

vs.

MARTIN LOWENSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions Below and Citations Thereto	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions	4
Statement of the Case	4, 5, 6
Reasons for Allowance of the Writ	7-16
Conclusion	16
Appendix A—Judgment of Supreme Court of Illinois	1a
Appendix B—Opinion of Appellate Court of Illinois	2a-6a
Appendix C—Judgment of Trial Court	7a

SEPARATE MATERIAL OF COURTS BELOW SEPARATELY PRESENTED PURSUANT TO RULE 21(1) OF THIS COURT

Record of Supreme Court of Illinois.

Record of Appellate Court of Illinois, First District.

Record of Circuit Court of Cook County, Illinois as filed in the Appellate Court of Illinois.

STATUTE LAW CITED.

Civil Practice Act of Illinois—Chapter 110, Section 40(1)(2) of Illinois Revised Statutes	7

PAGE

Table of Cases Cited

Armstrong v. Manzo, 85 S.Ct. 1187, 380 U.S. 545, 14 L. Ed.2d 62 (1965) 11

Becker Steel Co. of America v. Cummings, 16 F. Supp. 601 (1936) 9

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107 (1930) 14

Council of Federated Organizations v. Mize, 339 F.2d 898 (1964) U.S. Ct. of Appeals Fifth Circuit 11

Fournier v. Kitsos, 27 Ill. App.2d 464, 169 N.E.2d 803 (1960) 9

In Re Rosser, 101 F. 562, 41 CCA 497 (1900) 15

Nash v. Park Castles Apt. Bldg. Corp., et al., 384 Ill. 68, 50 N.E. 2nd 725 (1943) 13

Shaw v. Carrara, 312 Ill. App. 410 7

Watson v. Reissig, 24 Ill. 281 (1860) 9

Wilson v. Wilson, 56 Ill. App.2d 187, 205 N.E.2d 636 (1965) 8

Reference Works Cited

51 ALR 243 8

Freeman on Judgments, Section 1166 10

16A, CJS, Section 622, PP 820-21 11

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May It Please The Court:

Petitioner, Robert L. Nicholson, Plaintiff-Appellant in the courts below, petitions this Court to issue its writ of certiorari to review the judgment of the Supreme Court of Illinois entered March 28, 1967 in the cause of Robert L. Nicholson, Plaintiff-Appellant v. Martin Lowenstein, Defendant-Appellee, No. 40441, which denied leave to Robert L. Nicholson, Plaintiff-Appellant to appeal to said Supreme Court of Illinois from an Affirming Judgment of the Appellate Court of Illinois, First District entered by said Appellate Court on November 18, 1966 in the cause of Robert L. Nicholson, Plaintiff-Appellant v. Martin Lowenstein, Defendant-Appellee, No.

50741 which affirmed a judgment of the Circuit Court of Cook County, Illinois entered in favor of Robert L. Nicholson, Plaintiff v. Martin Lowenstein, Defendant, Nisi Prius No. 61 S 6101. On December 8, 1966 the said Appellate Court of Illinois denied the petition of Robert L. Nicholson, Plaintiff-Appellant, for Rehearing.

OPINION BELOW

The Supreme Court of Illinois did not publish an opinion. It entered judgment which overruled the prayer of the Petition for Leave To Appeal and denied leave to appeal (Rec. of Supreme Court of Illinois P. 4), and is appended hereto as Appendix "A". The opinion of the Appellate Court of Illinois, First District, reported at 77 Ill. App.2d 97; 222 N.E. 2d 157, is appended hereto as Appendix "B". The Circuit Court of Cook County, Illinois rendered no opinion in this cause but the judgment from which the Appeal was prosecuted is appended here to as Appendix "C".

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Illinois denying the Petition of Plaintiff-Appellant For Leave To Appeal the Affirming Judgment of the Appellate Court of Illinois, First District was entered March 28, 1967. (Rec. Supreme Court of Ill. P.4). Said Petition was filed in the Illinois Supreme Court January 12, 1967. (Rec. Supreme Court of Ill. P.1).

The affirming judgment of the Appellate Court of Illinois, First District was entered November 18, 1966, (Rec. Appellate Court of Ill. PP. 2, 3). Rehearing was denied December 8, 1966, (Rec. Appellate Court of Ill. PP. 3, 4).

Judgment was entered by the then Superior Court of Cook County, Illinois, now the Circuit Court of Cook County, Illinois under the Unified Court system of Illinois, July 5, 1962, (Rec. Circuit Court of Cook County, Illinois P. 31).

This Court has jurisdiction to review the judgment of the Supreme Court of Illinois by writ of certiorari pursuant to provisions of Title 28, Chapter 81, Section 1257(3) of the United States Code, the pertinent parts of which are:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ."

QUESTIONS PRESENTED

1. When a trial court summarily denies and dismisses an uncontradicted verified petition of Plaintiff to vacate a judgment entered in favor of Plaintiff and a purported satisfaction of same, which petition was corroborated by the uncontradicted affidavit of the attorney of record for plaintiff at the time of entry of judgment and satisfaction, and it ignores state legislation governing civil practice has it not denied the plaintiff due process?

2. In a post judgment motion, where a trial court denies a Plaintiff the right to call as a witness a party subpoenaed by him and denies Plaintiff the orderly presentation of proof is this not a violation of said Plaintiff's constitutional right to a full, fair and impartial hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV to the Constitution of the United States of America, Section 1, provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law, . . ."

A STATEMENT OF THE CASE

March 29, 1961 Petitioner sued Respondent in tort for wrongful death of Petitioner's father while the latter was in the care of Respondent. (CCR-3, 4)*

Complaint alleged employment of and undertaking by Respondent of obligation to care for the deceased. It further alleged Respondent negligently, improperly and unskillfully conducted himself so that deceased was in dire need of medical care and medication. Petitioner found on September 11, 1960 deceased naked upon a bed without sheets, a moldy crust of bread at his side, a stench of urine about him and on the stained mattress, an unused ten day supply of digitalis near deceased but inaccessible to him. Deceased found to be suffering from malnutrition, failure of bodily functions, and after effects of a myocardial infarction which occurred September 4, 1960. Deceased expired September 14, 1960. (CCR-3, 4)

Ad Damnum was Ten Thousand Dollars (CCR-4). Respondent answered denying wrongful or negligent act or omission on his part. (CCR 13, 14) Thereafter, Respondent filed a motion to dismiss. (CCR-15)

---

* As it will be necessary from time to time to refer to one of three records filed herein the following designation will be used:

1. CCR for Circuit Court Record,
2. ACR for Appellate Court of Illinois Record,
3. ISR for Illinois Supreme Court Record.

July 5, 1962 Honorable Harold G. Ward, Judge of the Circuit Court of Cook County, Illinois, entered an order reciting that cause came on for hearing upon the non jury call; that upon trial, issues found for plaintiff assessing damages of Two Hundred Dollars and costs and a finding that same has been paid in open court . . . "wherefore it is ordered that the same be and is satisfied in open court being now paid." Same is marked "O.K." and is signed by M. G. Kaufman, attorney for Petitioner and Martin Lowenstein Respondent pro se, though the latter was represented by counsel, to wit, Lawrence W. Harris. (CCR. 31) February 5, 1965 notice of motion and verified petition filed in behalf of Petitioner to vacate judgment for Petitioner and purported satisfaction of same, (CCR 33-40) alleged: judgment and satisfaction void in that though judgment recites "upon trial" there had been no testimony offered by either side nor a scintilla of evidence upon which court could assess damages; that no money was paid to Petitioner or his attorney in open court or at any other time to satisfy the judgment (CCR-37). That Petitioner was induced not to appear in court on date of judgment. That some letters were found after entry of judgment which would have made it impossible for Petitioner to consent to any judgment. That Petitioner was not guilty of laches in that his attorney advised him to stay out of court on date of entry of judgment order, the notes were not found by him until fourteen months after entry of said judgment order and he thereafter contacted trial judge who was unable to help Petitioner, so latter retained counsel. When Respondent did not appear in answer to the notice of motion, the trial Court ordered Petitioner to get Respondent in Court. (CCR-64, 66, 68, 70)

Subpoena was issued by Petitioner for Respondent to appear at hearing on petition. (CCR-44, 45) Petitioner's attorney denied right to interrogate Respondent when latter in court in answer to subpoena. (CCR-74, 80) Affidavit of M. G. Kaufman, attorney of record when judgment and purported satisfaction of same was entered, recited that said attorney never received payment of Two Hundred Dollars and costs or any other sum whatsoever from the Respondent. This was filed in support of Petitioner's petition. (CCR-47) Motion of Petitioner for an order on Respondent to answer the petition denied. (CCR 75, 76, 81, 82) Petitioner's request for continuance to bring in attorney M. G. Kaufman to testify was denied by Court. (CCR-84) The petition to vacate the judgment and purported satisfaction was then summarily denied and dismissed, (CCR-84, 85), from which order Petitioner appealed to the Appellate Court of the State of Illinois. (CCR-51, 52) (ACR-1)

The Appellate Court of Illinois affirmed the Trial Court's order of dismissal of the petition to vacate the judgment and satisfaction. (ACR-3) (Appendix B). A petition for rehearing was thereafter denied by said Appellate Court. (ACR-4)

A petition for Leave To Appeal To The Supreme Court of Illinois was then filed (ISR-2), which prayed relief under said Court's power to rule on constitutional question alleging deprivation of rights secured to Petitioner under Article II, Section II, XIX, Constitution of Illinois and Amendment XIV, Constitution of United States (ISR-2, P. 3 of Petition). Said Petition was denied (ISR-4) (Appendix A). From said judgment Petitioner prays this Honorable Court to issue its writ of certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

I.

WHERE A STATE BY STATUTE AND DECISION HAS ESTABLISHED LAW TO GOVERN CIVIL PRACTICE, A TRIAL COURT WHICH IGNORES SAME BY A SUMMARY DENIAL AND DISMISSAL OF A JUDGMENT CREDITOR'S UNCONTRADICTED VERIFIED PETITION TO VACATE SAID JUDGMENT AND PURPORTED SATISFACTION OF SAME, WHICH IS CORROBORATED BY HIS ATTORNEY'S UNCONTRADICTED AFFIDAVIT THEREBY DENIES DUE PROCESS TO SAID JUDGMENT CREDITOR.

At all times material herein there was in full force and effect in the State of Illinois a Civil Practice Act. The pertinent parts of same are Chapter 110, Section 40(1)(2) of the Illinois Revised Statutes. Section 40(1) thereof requires an explicit admission or denial of each allegation of the pleading to which it relates, otherwise, Section 40(2) provides that same stand admitted.

The First Division of the Appellate Court of Illinois in its affirmation of the judgment of the trial court failed to consider Petitioner's argument in this regard even though the Third Division of the same Appellate Court had previously held that where a petition is opposed by an oral motion to dismiss, but no pleading is filed in opposition thereto the Court is required to consider as true all of the well pleaded facts of the petition, *Shaw* v. *Carrara*, 312 Ill. App. 410.

Nor was the petition to vacate the judgment and purported satisfaction filed in this cause new to Illinois law. The manner in which to attack such a judgment and satis-

faction as in the case at bar had previously been established as by the filing of a petition. In *Wilson* v. *Wilson*, 56 Ill. App 2d 187, 205 N.E. 2d 636, the Second District of the same Appellate Court in 1965 said at P. 638 of the North Eastern Reporter that such a petition was

> "the filing of a new action and is subject to the usual rules governing civil cases . . . It is only where a pleading is so defective that there is a total failure to state a cause of action, and, hence, no pleading to sustain an order, that a litigant does not waive the insufficiency thereof by not objecting thereto by motion."

Again at Page 640 the court stated:

> ". . . the petition must be supported by affidavit or other appropriate showing . . . Where the facts are controverted, the proof should be presented at an orderly hearing *by examination of witnesses, under oath, subject to cross examination.*" (italics ours).

In a discussion of guide lines for lawyers with relation to satisfaction of judgment the leading book in Illinois, Nichols Illinois Civil Practice Act Annotated, Vol. 4A, Section 4787 relates:

> "The remedy employed to vacate entry of satisfaction of a judgment is by motion presented to the Court in which the entry was made asking for an order canceling such entry, or, expunging the entry of satisfaction."

In 51 ALR 243 where prevailing authority with regard to questions arising as to satisfaction of judgment is provided, it is said at Page 243:

> "A satisfaction of judgment has been said to be a mere receipt, which may be explained or even avoided by satisfactory proof."

At Page 241 it is said:

> "Relief may be had, in a variety of forms when a judgment appears from the record to be satisfied, but the entry of satisfaction was induced by fraud, mistake, inadvertence, or any other cause not producing an actual satisfaction . . . but the remedy usually resorted to is by motion in the original action . . . The time for the motion is not governed by the statute requiring motions for relief from a judgment or other proceeding taken against a party through his mistake, inadvertence, surprise or excusable neglect." And again at Page 242, "Thus, in case of absence or failure of consideration, the entry may be vacated."

In *Watson, et al* v. *Reissig,* 24 Ill. 281, where a satisfaction was entered without consideration the Supreme Court of the State of Illinois as early as 1860 said at Page 285:

> "In such case it was not proper, *but it was the duty of the court to set aside, or vacate the entry of satisfaction* . . ." (Italics ours).

A previous decision of the Appellate Court of Illinois made it mandatory for Petitioner to move to vacate the satisfaction before he could proceed against the judgment. In *Fournier* v. *Kitsos,* 27 Ill. App. 2d 464, 169 N. E. 2d 803, the Court said at Page 804:

> "The satisfaction had extinguished the judgment, therefore, the judgment could not be vacated without first setting aside the satisfaction."

In *Becker Steel Co. of America* v. *Cummings,* 16 F Supp. 601 the court said at Page 604:

> "The satisfaction piece is a receipt. Like other receipts, it may be explained or avoided by satisfactory

proof of invalidating conditions when the rights of third parties have not intervened, citing Freeman on judgments, Section 1166."

In conformity with statutes and decisions of the State of Illinois and the overwhelming weight of authority the allegations of the petition to vacate, which are well pleaded must be taken as admitted, to wit:

1. That though the judgment recites "upon trial" no testimony was offered nor was there a hearing as to damages; (CCR-37)
2. No money was paid to petitioner or his attorney in open court or at any other time or place to satisfy the judgment (CCR-37); This is supported by affidavit of said attorney. (CCR-47)
3. There was newly discovered evidence not available to petitioner at the time the judgment order and purported satisfaction was entered. (CCR-38)
4. Petitioner was not guilty of laches in that his attorney advised him to stay out of court, and he did not find new evidence until fourteen months after entry of said order. (CCR-38)

Petitioner respectfully submits that he was by the trial court's summary disposition of his uncontradicted verified petition supported by his attorney's affidavit denied his day in court. He further submits that the opinion of the Appellate Court of Illinois which completely avoided the issues raised as to Petitioner's right to expect that the law of Illinois which governs such proceedings be adhered to, and the subsequent denial of leave to appeal to the Supreme Court of Illinois, has compounded the denial of due process guaranteed to Petitioner by Amendment XIV of the United States Constitution.

16A, CJS, Section 622 states at pp. 820-821:

> "The benefit of a hearing or an opportunity to be heard is not a matter of grace, but is one of right, safeguarded to all by the due process clauses of the federal and state constitution. The doctrine applies to every court and to all kinds of judicial proceedings."

In *Armstrong* v. *Manzo,* 85 S.Ct. 1187, 380 U.S. 545, 14 L.Ed. 2d 62 this court through Mr. Justice Stewart said at p. 552 of the U.S. Report:

> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew."

This situation is completely analogous to the case at bar.

In *Council of Federated Organizations* v. *Mize,* 339 F.2d 898 the U.S. Court of Appeals in 1964 held at pp. 900-901:

> "The dismissal of the complaint for failure to state a claim was, as has been stated, without a hearing and without an opportunity to be heard. *The right of a litigant to be heard is one of the fundamental rights of due process of law. A denial of the right requires a reversal."*

Citing *Reynolds* v. *Cochran,* 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed 2d 754; *Hovey* v. *Elliott,* 167 U.S. 409, 17 S.Ct 841, 42 L.Ed. 215 (Italics ours).

II.

IN A POST JUDGMENT MOTION THE DENIAL TO A PLAINTIFF OF THE RIGHT TO CALL AS A WITNESS A PARTY SUBPOENAED BY HIM AND PRESENT PROOF IS A VIOLATION OF SAID PLAINTIFF'S CONSTITUTIONAL GUARANTEE TO DUE PROCESS.

The record is clear that petitioner's verified petition corroborated by affidavit of attorney Kaufman was not answered or otherwise pleaded to by respondent and present counsel brought this to the attention of the trial Court. (CCR-75, 76, 81, 82) In addition Petitioner was denied the right to present Respondent as a witness, even though Petitioner subpoenaed him for that purpose. (CCR-74, 80)

In its opinion the Appellate Court of Illinois intimated that present counsel did not wish to bring in the former attorney for Petitioner, M. G. Kaufman. (Appendix B) The following colloquy between present counsel and the trial court was obviously overlooked:

> "The Court: You get Kaufman in here. If he got the $200.00 that is one thing; if he didn't, Kaufman is in trouble." (CCR-80)
>
> "The Court: . . . If Kaufman wants to come in and say he didn't get the money, that is something else.
>
> "Mr. Cain: Then we will have to bring him in.
>
> "The Court: He (the defendant) has got nothing to do with it. You mean because if Kaufman took the money and didn't turn it over, therefore we start over a new trial against him?" (CCR-84). (Parenthesis ours)

This last remark by the trial court when it had before it an affidavit by M. G. Kaufman that said Attorney never received the $200.00 and costs or any other sum

whatsoever from the Respondent (CCR-47) estopped present counsel from any further effort with regard to testimony he could offer from M. G. Kaufman.

The record is clear that entry of judgment and satisfaction herein was one transaction (CCR-31). The uncontradicted verified petition and supporting affidavit of M. G. Kaufman establish beyond any doubt that $200.00 plus costs was not paid as recited therein. In its opinion the Appellate Court decided that the judgment was not void and that petitioner was barred under Section 72 of the Illinois Civil Practice Act, Illinois Revised Statutes 1963, Ch. 110, Section 72; the court stating: "Section 72 provides that a petition brought under that Act must be filed within two years, and failure to file a petition within that time requires its dismissal. . . . The plaintiff's petition was filed more than two years after the judgment and satisfaction complained of were entered in the trial court. The trial court properly dismissed the petition." Appendix B.

Petitioner is at a loss to understand why the Appellate Court applied Section 72 of the Civil Practice Act but overlooked the application of the Act and decisions thereunder which provide for due process in a court of law as pointed out in Point I hereof.

Nor does petitioner comprehend the reason for the conflict of the decision complained of with *Nash* v. *Park Castles Apt. Bldg. Corp. et al.*, 384 Ill. 68, 50 N.E. 2d 725 where the Supreme Court of the State of Illinois said at p. 729 that:

> "an exception to the rule that the Courts may not set aside final judgment or decrees after the term has expired or thirty days from the entry thereof, is where a judgment has been obtained through fraud or by concealing or misrepresenting facts to the court."

In the case at bar it need not be argued that a trial court would not have entered said judgment and satisfaction if the uncontroverted facts set forth in the verified petition supported by affidavit of an officer of the court were known to the court at the date of entry. All opportunity to explain or avoid the judgment and satisfaction thereof by satisfactory proof, or to present evidence in support of Petitioner's contentions was squelched by the trial court. Therein lies the denial of due process to the Petitioner.

In *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill*, 50 S.Ct. 451; 281 U.S. 673, 74 L.Ed. 1107 this court through Mr. Justice Brandeis stated at p. 680:

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

And again at p. 681:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support."

At p. 682 this court cautioned:

> ". . . while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislative, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

One of the best definitions of due process as applicable to the case at bar is contained in the case of *In Re.*

Rosser, Circuit Court of Appeals, Eighth Circuit, 101 F 562, 41 CCA 497.

The Court at P. 567 quoted Judge Cooley's definition of the meaning of due process:

> "Perhaps no definition, is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'"

The Court said further at p. 567:

> "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought . . . and the opportunity to be heard must be such that he may, if he chooses, cross examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue. . . . Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principles of our laws and cannot be sustained."

If as the cases indicate we are a nation of law and not just a nation of men, is it not necessary to preserve the right of a litigant to be heard in open court? If proof is proffered does not the Fourteenth Amendment require an orderly reception of same? If the satisfaction of

record is upheld is not Petitioner denied his right to collect the amount of the judgment? If as it is alleged and completely uncontradicted that no actual consideration was given for the satisfaction is not Petitioner denied a substantial right guaranteed by the Fourteenth Amendment?

The arbitrary dismissal of the petition to vacate and the suspension of rules of practice as well as the conflict of the decision in the case at bar with other cases of last resort decided in Illinois and elsewhere, offends the conscience and the minimum standards of fairness and justice of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the case at bar justifies issuance of this Court's writ of certiorari to the Supreme Court of Illinois to review the judgment of that court entered in this cause.

Respectfully submitted,

WILLIAM A. CAIN
Attorney for Petitioner.

APPENDIX A

Judgment of the Supreme Court of Illinois, entered March 28, 1967 (ISR-4) as follows:

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

APPENDIX B

OPINION OF APPELLATE COURT

MR. JUSTICE MCCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in the Circuit Court of Cook County which denied and dismissed plaintiff's petition to vacate the judgment order and satisfaction of the same entered on July 5, 1962.

On March 29, 1961, the plaintiff filed a suit against the defendant alleging that the defendant was employed by the plaintiff as a practical nurse and attendant for the plaintiff's father who was over 83 years old and who suffered from a complication of diseases because of which he required diet and medication at specific times. It is alleged that the defendant failed to follow instructions given him as to the diet, medication and care, and as a result the father of plaintiff died from a heart attack.

The attorney for the plaintiff at the time of the filing of the suit was M. G. Kaufman. The defendant, through his attorney, Lawrence W. Harris, filed an appearance and answer on April 5, 1961, denying the allegations set out in the plaintiff's complaint. Later, on May 19, 1962, without withdrawing his answer, the defendant's attorney filed a motion to dismiss the suit. On March 8, 1962, the case was dismissed for want of prosecution. On March 12, 1962, the dismissal for want of prosecution was set aside. On June 10, 1962, the cause was again dismissed for want of prosecution; on June 22, 1962, the order of dismissal was set aside, and on July 5, 1962, on motion

of Kaufman [plaintiff's attorney], the court set the cause for hearing on the same date. On that date the court entered the following order:

> "And now this cause coming on for hearing upon the non-jury call, the defendant Martin Lowenstein attending in response to the trial call upon trial and consideration the court finds the issues for the plaintiff Robert Nicholson against defendant Martin Lowenstein and assesses damages in the sum of $200; Wherefore it is ordered plaintiff recover $200 and costs.
>
> "Further finds that the same has been paid in open court wherefore it is ordered that the same be and it is satisfied in open court being now paid.—"

The order was signed by the trial judge and also contained the notation "OK. M. G. Kaufman, Martin R. Lowenstein."

On February 5, 1965, the plaintiff, having engaged his present attorney, filed a petition to vacate the judgment and satisfaction. In that petition it was alleged that the judgment and satisfaction were void inasmuch as there was a motion to strike the complaint and dismiss the cause of action in the record. It was further alleged that the judgment and satisfaction are void in that there was no testimony offered by either party; that they are void in that no money was paid to plaintiff or to plaintiff's attorney in open court, nor at any other time or place, to satisfy the judgment. The plaintiff further alleged that he has newly discovered evidence of two letters written by his father, complaining of the treatment he received from the defendant, and plaintiff alleged that he "was induced not to appear in court on the date of entry of judgment"; that plaintiff was not guilty

of negligence or want of diligence in allowing the judgment to be entered; that "his attorney advised him to stay out of court on the date the judgment was entered"; and that fourteen months after the entry of the judgment the plaintiff found the letters set out in the petition.

The plaintiff also filed an affidavit dated March 18, 1965, in which M. G. Kaufman stated:

> ". . . that as such he was attorney for the Plaintiff in the above entitled cause on the 5th day of July, 1962, when judgment therein was recovered for the Plaintiff, Robert L. Nicholson and against the Defendant, Martin Lowenstein in the sum of Two Hundred Dollars ($200.00) and costs, that said judgment was satisfied in open Court.
>
> "Further, Affiant sayeth that as attorney for said Plaintiff, Affiant never received payment of the Two Hundred Dollars ($200.00) and costs, or any other sum whatsoever from the Defendant, Martin Lowenstein."

The court held hearings on the petition on February 5, March 19, and April 30, 1965; at the March 19 hearing counsel for the plaintiff stated he had an affidavit from Mr. Kaufman which he had obtained "to obviate the necessity of dragging Mr. Kaufman in and taking his time." At this hearing the defendant appeared in person, represented by no attorney. The court continued the matter until April 30, 1965, to permit the defendant to get an attorney, and at that hearing the defendant was represented by an attorney from the Legal Aid Bureau. The court asked, "Where is Kaufman?" and counsel replied that he was not available. The court then said, "Kaufman was the one who presented the order. You were going to get Kaufman in here." Counsel stated that he did not understand that the court wanted Kaufman

to come into court, and the court again stated that Kaufman should be brought into court. After some further discussion with reference to Kaufman, counsel for the plaintiff said, "I have no quarrel as to Kaufman."

On May 3, 1965, the court entered an order denying plaintiff's petition, and it is from this order that the plaintiff takes this appeal.

The plaintiff here alleges that the Judgment entered in his favor in the trial court was void. It is, of course, the law that a void judgment is subject to attack at any time. [*Cherin* v. *The R. & C. Company,* 11 Ill. 2d 447, 143 N.E. 2d 235, together with cases therein cited.] However, in the instant case the judgment was entered in the trial court at a time when the plaintiff was represented by counsel and the defendant was in court in person. As we have pointed out, the judgment order was okayed by the defendant in person and by the plaintiff through his attorney. Where a judgment is entered in that form it is not a void judgment.

Since we hold it is not void, any other attack upon the judgment which the plaintiff could be considered to have made under his petition must be treated as falling within the provisions of Section 72 of the Civil Practice Act [Ill. Rev. Stat. 1963, ch. 110, § 72]. Section 72 provides that a petition brought under that Act must be filed within two years, and failure to file a petition within that time requires its dismissal. *Antczak* v. *Antczak,* 61 Ill. App. 2d 404, 209 N.E. 2d 838. The plaintiff's petition was filed more than two years after the judgment and satisfaction complained of were entered in the trial court. The trial court properly dismissed the petition.

We adopt the statement made in *Zaidenberg* v. *Occidental Life Ins. Co.*, 65 Ill. App. 2d 305, 212 N.E. 2d 526, as applicable to the instant case:

> "The appellee filed no brief nor appearance. Under such a circumstance we could have, in accordance with the prayer of the appellants, reversed the judgment of the Circuit Court. [Citing cases.] However, in those cases the court did examine the record. In the instant case we have examined the record and the appellants' brief, and we have determined that in order to do substantial justice the order of the trial court should be affirmed. *Barton* v. *Barton*, 318 Ill. App. 68, 47 N.E. 2d 496; 2 ILP 560."

The order of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DRUCKER, *P.J.*, and ENGLISH, *J.*, concur.

APPENDIX C

Judgment of the then Superior Court of Cook County, Illinois now the Circuit Court of Cook County, Illinois was entered on July 5, 1962 as follows: (CCR-31)

And now this cause coming on for hearing upon the non-jury call, the defendant, Martin Lowenstein, attending in response to the trial call, upon trial and consideration the court finds the issues for the plaintiff, Robert Nicholson, against defendant, Martin Lowenstein, and assesses damages in the sum of $200.00: Wherefore it is ordered plaintiff recover $200.00 and costs.

Further finds that same has been paid in open court wherefore it is ordered that the same be and it is satisfied in open court being now paid.

ENTER: Harold G. Ward
Judge of the Superior Court

OK: M. G. Kaufman
Martin R. Lowenstein